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Kentucky Law Survey: Evidence

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Evidence

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This Article discusses recent developments in evidence. It focuses on specific issues, including statements for medical treatment or diagnosis, tape recordings, "probativeness" versus "prejudice," and others.

I. STATEMENTS FOR MEDICAL TREATMENT OR DIAGNOSIS

A. Background

The law of evidence has long included a hearsay exception for statements made by patients to physicians. It was once limited to statements made to "treating" physicians[1] (under an assumption that statements not motivated by treatment were unreliable for use as evidence). The Federal Rules of Evidence codified the exception but expanded its coverage to include statements made to "nontreating" physicians[2] (for reasons totally unrelated to the reliability of such statements[3]). The Supreme Court of Kentucky adopted the federal

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[1] *See, e.g.*, Equitable Life Assurance Soc'y v. Fannin, 53 S.W.2d 703, 706 (Ky. 1932); North Am. Accident Ins. Co. v. Caskey's Adm'r, 4 S.W.2d 383, 384 (Ky. 1928).

[2] The "nontreating" physician is one to whom statements are made for some purpose other than treatment, "usually readying the physician to provide testimony on behalf of the declarant." ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK 440 (3d ed. 1993).

[3] *See* FED. R. EVID. 803(4) advisory committee's note.

> Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not

exception in *Drumm v. Commonwealth*[4] and then codified that decision when it adopted the Kentucky Rules of Evidence ("K.R.E."). The exception is defined as "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis."[5] Doubt concerning the applicability of the exception has been prevalent since *Drumm*, solely because of the expansion of the exception to cover statements made to "nontreating" physicians. The supreme court has revisited the issue on multiple occasions, most recently in the case of *Miller v. Commonwealth*.[6]

B. Miller v. Commonwealth

In *Miller*, the defendant was charged with sexually abusing a six-year-old child who lived in his apartment complex. The specific accusations were that the defendant took the child into his apartment, threatened her with a gun, and sexually molested her. Some time after these alleged events, upon referral by a family doctor, the child was examined by a physician from a children's hospital. During this examination, the child told the physician about sexual acts committed upon her by the defendant.

When called as a witness against the defendant, the physician was asked to describe the purpose of her examination of the child.

> Dr. Sugarman first stated that the child had come to her for "evaluation of sexual abuse," but, upon questioning by the Commonwealth, explained that her purpose in seeing the girl was to "treat" her. However, the doctor testified that she had seen the child only once . . . for a total of one hour, and had neither prescribed medication nor given the girl any counseling.[7]

The physician was then permitted, over defense objection, to testify that the child had described various sexual acts committed upon her by the defendant. The child also testified, generally confirming the accusations against the defendant while giving what the supreme court described as "vague testimony . . . in response to leading questions."[8] After his conviction, the defendant

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admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation.

56 F.R.D. 183, 306 (1972).

[4] Drumm v. Commonwealth, 783 S.W.2d 380, 384 (Ky. 1990).

[5] KY. R. EVID. [hereinafter K.R.E.] 803(4); *see* FED. R. EVID. 803(4).

[6] Miller v. Commonwealth, 925 S.W.2d 449 (Ky. 1996).

[7] *Id.* at 450-51.

[8] *Id.* at 451.

appealed on the ground that the physician's testimony was erroneously admitted in violation of the hearsay rule. Using *Drumm* as its yardstick, the supreme court agreed with the defendant and reversed the convictions.[9]

C. Drumm *and* Sharp

Drumm involved the prosecution of a father for the rape and sodomy of his two young children (ages three and six).[10] Statements relevant to the charges had been made by the children to two psychologists and a psychiatrist who had been involved in their care and treatment and in the investigation of charges against the defendant. The supreme court abandoned its prior position that statements to physicians were admissible only if made for purposes of obtaining treatment and adopted in its place a position that it described as follows:

> In the event of a retrial in the present case, we direct the trial court to decide the hearsay question regarding each of the various out-of-court statements by the children to the psychiatrist and the psychologist by making a judgment as to whether "prejudicial effect outweighs . . . probative value," taking into account that when such statements are not made for the purpose of treatment they have "less inherent reliability than evidence admitted under the traditional common-law standard underlying the physician treatment rule."[11]

This rule, said the court, "blurs the distinction between treating and testifying physicians [but] does not completely abolish it."[12] A somewhat clearer picture of this "blurred distinction" emerged three years later when the court rendered its decision in *Sharp v. Commonwealth*.[13]

In that case, like *Drumm*, the hearsay consisted of statements made by children to a psychiatrist about alleged sexual acts by the defendant.[14] The court described the circumstances under which the examination that produced the statements was conducted:

> Dr. Hilton indicated generally that he saw the children to evaluate, diagnose, and treat them, but from the substance of his testimony, it is clear

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[9] *See id.*

[10] *See* Drumm v. Commonwealth, 783 S.W.2d 380 (Ky. 1990).

[11] *Id.* at 385.

[12] *Id.* at 384.

[13] Sharp v. Commonwealth, 849 S.W.2d 542 (Ky. 1993).

[14] *See id.* at 543.

> that he was not a treating physician as that term is normally understood. He was hired by Social Services for the purpose of evaluation, and any treatment recommendation he made was incidental to his primary duty.[15]

The court then indicated more clearly than before that the "blurred distinction" of *Drumm* had, in effect, created two separate hearsay exceptions: one for statements to treating physicians (admissible if pertinent to treatment or diagnosis) and one for statements to nontreating physicians (admissible if "from the totality of the circumstances the probative value of the evidence outweighs its prejudicial effect.")[16] The court acknowledged that its seemingly simple approach had proved to be anything but simple – "we are thus required to revisit one of the most vexatious questions of law to come before this Court in the last decade."[17] (This reference was to the exception for statements to nontreating physicians, especially by children alleging sexual abuse by defendants.)

D. The Ambiguity of Drumm

Trial judges are regularly required to balance probativeness against prejudice in determining the admissibility of evidence.[18] While this task is relatively routine in most instances, it has proven troublesome under *Drumm*, mostly because of uncertainty concerning the meaning of the "prejudice" component of the formula. Evidence is usually viewed as "prejudicial" if it has the capacity to arouse an emotional response in decision-makers (e.g., graphic photographs of a murder victim) or if it has "an undue tendency to suggest decision on an improper basis"[19] (e.g., a prior conviction for murder in a murder case).

As a class of evidence, statements to nontreating physicians are not likely to arouse passion in triers of fact, and they have no obvious tendencies to suggest decision on an improper basis (unless they are totally lacking in probativeness). *Drumm* assumes that the evidence has "prejudice" that can be weighed against its "probative value," but sheds no light at all on the precise nature of this prejudice nor on the means by which the prejudice works its harmful effects. Except for one unexplained statement suggesting that the

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[15] *Id.*

[16] *Id.* at 544.

[17] *Id.* at 543.

[18] An objection on grounds of unfair prejudice may be made against any kind of evidence under K.R.E. 403 and its federal counterpart.

[19] FED. R. EVID. 403, Advisory Committee's Note.

prejudice results from "the aura which attends such testimony"[20] (presumably because the witness is a physician[21]), the supreme court has shed no light on the subject since *Drumm*, unless enlightenment on the subject can be found in *Miller*.

E. Back to Miller

Miller's most notable achievement may be the clear obligation imposed on trial judges to make an authentic determination of the status of the physician offering the hearsay into evidence. The physician in *Miller* prescribed no medication, performed no counseling, and saw the "patient" but once for a period of one hour about four weeks after the alleged events occurred.[22] She was "'not a treating physician as that term is normally understood'"[23] and the trial court erred in concluding otherwise. The benefits of the more liberal rule of admission for statements made to treating physicians cannot be obtained simply by having the physician testify that he/she was consulted for treatment (when circumstances suggest otherwise).

Miller contains observations about both components of *Drumm's* prejudice-versus-probativeness equation. The *Miller* opinion implies that the probative value of statements made to nontreating physicians should be viewed as suspect, unless physical findings from the examination correlate to the alleged abuse. More importantly perhaps, the opinion indicates that in judging the potential for prejudice from such statements, the strength or weakness of the prosecution's case (without the hearsay) is an important consideration. Therefore, the *Miller* court concluded that because the prosecution's case was "exceptionally weak," the testimony of the physician, "which had the undeniable effect of bolstering the child's testimony, was severely prejudicial."[24]

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[20] Sharp v. Commonwealth, 849 S.W.2d 542, 545 (Ky. 1993).

[21] An "aura of infallibility" is sometimes given as the reason for excluding expert testimony on scientific subjects. The concern is that jurors will be overly influenced by the credentials of the witness and attribute greater weight to the evidence than it deserves. It is difficult to see this factor at work in *Drumm*, since the physician merely testifies to what the declarant said out of court about an ordinary (nonscientific) event.

[22] *See* Miller v. Commonwealth, 925 S.W.2d 449, 451 (Ky. 1996).

[23] *Id.* (quoting Sharp v. Commonwealth, 849 S.W.2d 542, 543 (Ky. 1993)).

[24] *Id.* at 451.

F. Conclusion

Miller provides little help on the problem that the supreme court has described as "most vexatious" – the admissibility of statements made to nontreating physicians by apparent victims of child abuse. The "medical" procedures from which these statements arise are almost always intertwined with criminal investigations. They are thus deprived of the guarantee of trustworthiness that exists when treatment is the driving force. It is difficult in the typical case to find significantly greater indicia of reliability in these statements than can be found in almost any out-of-court statement. Thus, use of the "medical treatment or diagnosis" exception for admission of such statements extends the rationale for the exception to its absolute limit, if not beyond. *Miller* clearly indicates that the floodgates will not be opened for hearsay of this type and for that reason alone it is a significant decision.

II. TAPE RECORDINGS – AUTHENTICATION AND HEARSAY

A. Brock v. Commonwealth[25]

Brock involved a murder prosecution and a claim of self-defense that produced a factual dispute over whether the defendant or the victim had been the aggressor in the deadly confrontation.[26] The defendant proved an earlier confrontation in which the victim had threatened future harm to the defendant.[27] He called the victim's mother as a witness to prove that the victim had come to the fatal encounter after expressing an intent to kill the defendant; the witness denied that the victim had expressed such an intent. When asked if she had ever made a contrary statement in a telephone conversation with an acquaintance, the witness claimed a lack of recollection.[28]

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[25] Brock v. Commonwealth, 947 S.W.2d 24 (Ky. 1997).

[26] *See id.* at 26. There were no eyewitnesses to the act of killing, although a bystander was near enough to hear the sequence of gunfire from the two participants. *See id.*

[27] That confrontation occurred in the defendant's home three weeks before the homicide. The victim had come there while intoxicated to accuse the defendant of killing his dogs; he was armed with a shotgun. The defendant disarmed the victim and gave the gun to a nephew who had come to defendant's home to restrain the victim after a call from the defendant's wife. *See id.*

[28] *See id.*

Defense counsel attempted to confront the witness with a tape recording of a conversation in which she clearly stated that before going to the scene of the homicide, her son had expressed an intent to kill the defendant. The prosecution objected and the trial court refused to permit the defense to use the recording. Defense counsel called the mother's acquaintance as a witness to inquire about the taped telephone conversation. She testified to a lack of recollection of the details of the conversation, but said that the recording might refresh her recollection. The prosecution objected to its use for this purpose and the court sustained the objection.[29]

Upon conviction for first degree manslaughter, the defendant appealed on the ground that exclusion of the tape recording was reversible error. The supreme court reversed the conviction.[30] In so doing, it rendered a clarifying opinion on authentication of tape recordings and addressed some significant issues concerning the hearsay use of out-of-court statements by witnesses.

B. Authentication of Tape Recordings

In this case, which is typical, the tape recording was offered into evidence to prove the content of a conversation. With respect to authentication of such evidence, Kentucky's case law points in opposite directions. In an early case, the supreme court imposed rigorous foundation requirements on admissibility. Among other things, it required showings that the recorder was capable of recording communications and that it had been used by a competent operator.[31] In later cases, the court clearly accepted less authentication of recorded evidence,[32] although it never explicitly overruled the earlier decision. As a result, lawyers argue over what the law requires and

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[29] *See id.*

[30] *See id.*

[31] *See* Commonwealth v. Brinkley, 362 S.W.2d 494, 497 (Ky. 1962).

> [A] proper foundation for the admission of a recording would consist of (1) a showing that the mechanical transcription device was capable of taking testimony, (2) a showing that the operator of the device was competent to operate the device, (3) establishment of the authenticity and correctness of the recording, (4) a showing that changes, additions, or deletions have not been made, (5) a showing of the manner of the preservation of the record, (6) identification of the speakers, and (7) a showing that the testimony elicited was freely and voluntarily made, without any kind of duress.

Id.

[32] *See, e.g.*, Campbell v. Commonwealth, 788 S.W.2d 260, 264-65 (Ky. 1990); Poteet v. Commonwealth, 556 S.W.2d 893, 895 (Ky. 1977).

trial courts struggle with a very simple issue. *Brock* provides some clarification.

In *Brock*, the Commonwealth argued that the tape recording had not been adequately authenticated, relying on the older authority described above. The court acknowledged the apparent conflict in the cases, rejected the Commonwealth's argument, and provided clearer guidance on the foundation needed for tape recordings.[33] The general standard for authentication, said the court, is "evidence . . . sufficient to support a finding that the matter in question is what its proponent claims."[34] For tape recordings, such evidence is produced when a competent witness identifies the voices on the tape recording and testifies "that the recording is an accurate reproduction of their conversation."[35]

C. *Out-of-Court Statements by Witnesses*

The hearsay issues in *Brock* were complex because the evidence needed by the defendant (i.e., the victim's expression of an intent to kill the defendant) was buried in three layers of hearsay – the tape recording itself, the mother's statement on the recording, and the statement by the victim to his mother. The deepest layer (the victim's statement) was easily found admissible under the state-of-mind exception,[36] and the top layer (the tape recording) was ruled admissible under the past-recollection-recorded exception.[37] The middle layer (the mother's statement) was ruled admissible

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[33] *See Brock*, 947 S.W.2d at 29-30.

[34] *Id.* at 30.

[35] *Id.*

[36] *See* K.R.E. 803(3). One of the common uses of the present state-of-mind exception is to admit statements expressing intent to engage in an act to prove that the declarant subsequently acted in accord with his or her intent. In this instance, the statement would tend to support a finding that the declarant (the victim) was the initial aggressor in the deadly encounter. K.R.E. 803(3) would clearly apply to this level of hearsay.

[37] *See* K.R.E. 803(5). This exception applies to an out-of-court statement by a witness who cannot testify about the matter described in the statement due to a loss of memory. If made when the matter was fresh in the mind of the witness and verified as accurate by that witness, the statement is admissible under K.R.E. 803(5) as "past recollection recorded." The court correctly concluded that this exception could have been used to admit the tape recording if the trial court had given the defendant a fair chance to show its prerequisites. *See Brock*, 947 S.W.2d at 30.

as a prior inconsistent statement of a witness.[38] *Brock* adds nothing to the law on the state-of-mind exception but makes important, though minor, points about the other exceptions.

The question of using "past recollection recorded" to admit a tape recording into evidence had not been considered before *Brock*. The language of K.R.E. 803(5) defines the exception as one applicable to a writing – i.e., "*memorandum or record* concerning a matter about which a witness once had knowledge."[39] Correctly noting that the exception could have been used to admit a written memorandum of the telephone conversation into evidence (assuming no recollection by the participants), the court stated, "Obviously, a tape recording of the conversation would be an even more accurate record of what was said."[40] The court described as "persuasive" federal cases applying the exception to tape recordings[41] and held that the defense should have been allowed to introduce the recording as "past recollection recorded."[42]

The hearsay exception for prior inconsistent statements of a witness is defined in K.R.E. 801(A)(a)(1). It requires only that the declarant testify at trial and be subject to examination concerning the statement.[43] The exception is based on an assumption that the opponent of such hearsay can adequately test the evidence through cross-examination of the witness. If the witness claims a lack of recollection when confronted with the prior statement, there arises reason to doubt the adequacy of the cross-examination. The witness in *Brock* claimed loss of recollection concerning the making of the statement.[44] The supreme court held the hearsay exception applicable nonetheless: "A statement is inconsistent for purposes of K.R.E. 801A(a)(1) whether the witness presently contradicts or denies the prior statement, *or whether he claims to be unable to remember it.*"[45] Would the court have ruled similarly if the witness had claimed a loss of recollection of the event described in the

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[38] *See* K.R.E. 801(A)(a)(1). She testified at trial that her son had not expressed intent to kill the defendant. *See Brock*, 947 S.W.2d at 28.

[39] K.R.E. 803(5) (emphasis added). It also says that "the memorandum or record *may be read* into evidence" if admissible, again implying that the exception is applicable to writings that contain lost memory of a witness. *Id.* (emphasis added).

[40] *Brock*, 947 S.W.2d at 30.

[41] The court listed two cases it found to be persuasive: United States v. Kusek, 844 F.2d 942 (2d Cir. 1988), and United States v. McKeever, 271 F.2d 669 (2d Cir. 1959). *See Brock*, 947 S.W.2d at 30.

[42] *See Brock*, 947 S.W.2d at 30.

[43] *See* K.R.E. 801(A)(a)(1).

[44] *See Brock*, 947 S.W.2d at 28.

[45] *Id.* at 27 (emphasis added).

prior statement? Such a claim would raise even greater doubt about the adequacy of cross-examination of the witness than was raised by the facts of *Brock*. In its opinion, the court cited approvingly a decision of the Court of Appeals of Kentucky holding prior inconsistent statements admissible even in this latter situation.[46] Whether or not the court would embrace this position after more careful consideration of the issue remains to be seen.

III. "PROBATIVENESS" VERSUS "PREJUDICE"

A. Introduction

The most heavily used, and arguably most important, provision of the Kentucky Rules of Evidence is K.R.E. 403. It notes that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."[47] K.R.E. 403 is the law's general exclusionary rule. It requires an exercise of discretion by trial judges and formulates an equation under which that discretion is to be exercised.[48] Notwithstanding the enormous importance of the provision and its federal counterpart,[49] appellate courts have provided only limited guidance on how to make determinations under the equation. Fortunately, the United States Supreme Court departed

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[46] *See id.* The case cited by the court was *Wise v. Commonwealth*, 600 S.W.2d 470 (Ky. Ct. App. 1978). In that case, it is clear that the court of appeals intended to limit admission of the out-of-court statement to situations in which there is reason to believe that the claimed loss of recollection is fabricated. It gave the following reason for its decision: "No person should have the power to obstruct the truth-finding process of a trial and defeat a prosecution by saying, 'I don't remember.'" *Id.* at 472.

[47] K.R.E. 403.

[48] The following judgments are required by the equation formulated in K.R.E. 403:

> (i) assessment of the probative worth of the evidence whose exclusion is sought; (ii) assessment of the probable impact of specified undesirable consequences likely to flow from its admission (i.e., 'undue prejudice, confusion of the issues, or misleading the jury, . . . undue delay, or needless presentation of cumulative evidence'); and (iii) a determination of whether the product of the second judgment (harmful effects from admission) exceeds the product of the first judgment (probative worth of the evidence).

LAWSON, *supra* note 2, at 56.

[49] FED. R. EVID. 403.

from this practice recently when it rendered a decision in *Old Chief v. United States*.[50] The case involved Rule 403's most important and most common inquiry – whether evidence should be excluded because its "probativeness" is outweighed by its "prejudice."

B. Old Chief v. United States

The defendant in *Old Chief* was prosecuted for possession of a firearm after having been convicted of a felony. At trial there was a joinder of this charge and charges of assault with a dangerous weapon and use of a firearm to commit a crime of violence. In an attempt to foreclose the risk of prejudice with respect to the latter charges, the defendant offered to stipulate that he had a prior conviction for a felony offense.[51] The stipulation would eliminate the prosecution's need to prove a required element of the offense of possession of a firearm by one previously convicted of a felony. As a result, the defendant would also achieve his objective: to prevent the jury from hearing that his prior conviction was for assault causing serious bodily injury.

The prosecution refused to accept the stipulation and claimed a right to prove the required elements of the offense, including the name and nature of the offense that resulted in the prior conviction. The trial court rejected the defendant's offer of stipulation and permitted the prosecution to introduce evidence showing that the defendant had previously been convicted of assault causing serious bodily injury. The jury returned guilty verdicts on all counts.[52] The defendant appealed, arguing that the probativeness of the evidence of his prior conviction, when considered in light of his stipulation, was substantially outweighed by its prejudicial effect on the other charges. The Ninth Circuit affirmed, concluding that the stipulation was not a relevant consideration under Rule 403 and that the trial court had not abused its Rule 403 discretion.[53] The United States Supreme Court granted certiorari and reversed.[54]

C. Applying Rule 403's Equation

Old Chief is significant for what it says about the analytical method by which to determine the "probativeness" of evidence when balancing

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[50] Old Chief v. United States, 117 S. Ct. 644 (1997).
[51] *See id.* at 646.
[52] *See id.* at 648.
[53] *See id.* at 649.
[54] *See id.*

"probativeness" against "prejudice" under Rule 403. The Court considered two possibilities – (1) viewing the evidence "as an island, with estimates of its own probative value and unfairly prejudicial risk the sole reference points in deciding whether the . . . evidence ought to be excluded"[55] or (2) viewing the evidence in light of available evidentiary alternatives, with estimates of its probative value being discounted when the offering party has "less risky alternative proof going to the same point."[56] The Court found support for the latter alternative in the history of Rule 403 and concluded as follows:

> [W]hat counts as the Rule 403 "probative value" of an item of evidence . . . may be calculated by comparing evidentiary alternatives. . . . Thus . . . when Rule 403 confers discretion by providing that evidence "may" be excluded, the discretionary judgment may be informed not only by assessing an evidentiary item's twin tendencies ["probativeness" and "prejudice"], but by placing the result of that assessment alongside similar assessments of evidentiary alternatives.[57]

The alternative that the defendant offered was a stipulation that was described by the Court as "not merely relevant but seemingly conclusive evidence of the element"[58] sought to be proved by the prejudicial evidence (i.e., defendant's prior conviction). Consequently, "the risk of unfair prejudice did substantially outweigh the *discounted probative value* of the record of conviction, and it was an abuse of discretion to admit the record when an admission was available."[59]

IV. MISCELLANEOUS

A. Preserving Errors for Review

Motions in Limine: K.R.E. 103(d) provides that motions in limine (if resolved by order of record) are "sufficient to preserve error for appellate review."[60] In *Tucker v. Commonwealth*,[61] the defendant moved in advance of trial for exclusion of testimony concerning an uncharged offense and made

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[55] *Id.* at 651.
[56] *Id.*
[57] *Id.* at 652.
[58] *Id.* at 653.
[59] *Id.* at 655 (emphasis added).
[60] K.R.E. 103(d).
[61] Tucker v. Commonwealth, 916 S.W.2d 181 (Ky. 1996).

a general objection to the same testimony at the outset of trial. However, the defendant did not object on specific grounds when the testimony was offered into evidence.[62] The Supreme Court of Kentucky ruled that the defendant's actions had not properly preserved error for appellate review:

> An objection made prior to trial will not be treated in the appellate court as raising any question for review which is not strictly within the scope of the objection as made, both as to the matter objected to and as to the grounds of the objection. It must appear that the question was fairly brought to the attention of the trial court. . . . While this Court has approved the use of motion in limine as a means of obtaining pretrial rulings concerning the admission and exclusion of evidence, we have not repealed the contemporaneous objection rule. One claiming error may not rely on a broad ruling and thereafter fail to object specifically to the matter complained of.[63]

There are two ways to interpret this statement and no easy way to choose between the two. Does the court mean that motions in limine will not preserve errors for review if based on "general" rather than "specific" objections? Or does it mean that such motions will not preserve errors unless a contemporaneous objection is made when the evidence is offered at trial? The second interpretation would seem to be plainly at odds with K.R.E. 103(d);[64] the first would demand more of pretrial objections than is demanded of objections at trial.[65] Drafters of the Kentucky Rules of Evidence sought to make it clear that motions in limine would preserve errors for appellate review.[66] Whether or not this objective has been achieved may well depend

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[62] *See id.* at 183.

[63] *Id.*

[64] "A motion in limine resolved by order of record is sufficient to preserve error for appellate review." K.R.E. 103(d).

[65] K.R.E. 103(a)(1) provides that grounds for objections to evidence need not be given unless requested by the court.

[66] In some jurisdictions the case law leaves doubt about the extent to which motions in limine may be used to preserve errors for review. As a result litigants are forced to renew objections or offers of proof at trial even though brought to the attention of the judge and opposing counsel prior to trial. Subdivision (d) [of Rule 103] eliminates this doubt by providing that motions in limine resolved by order of record are sufficient to preserve errors for appellate review.

EVIDENCE RULES STUDY COMMITTEE, KENTUCKY BAR ASSOCIATION, KENTUCKY RULES OF EVIDENCE - FINAL DRAFT 5 (Nov. 1989).

upon what the court meant when it said "we have not repealed the contemporaneous objection rule."[67]

Avowals: If evidence is excluded upon objection, preservation is accomplished by entering the excluded testimony into the record. K.R.E. 103 is ambiguous with respect to whether such testimony must be produced from the lips of the witness or whether it can be produced through an avowal by legal counsel.[68] It is more accurate and informative to produce the testimony through interrogation of the witness outside the hearing of the jury, but more efficient to permit counsel to state the substance of the excluded testimony for the record. In *Partin v. Commonwealth*,[69] the supreme court eliminated the ambiguity of K.R.E. 103 by choosing accuracy over efficiency:

> A review of the record discloses that appellant did not request that an examination be conducted outside the presence of the jury and offer the testimony by avowal under RCr 9.52.... Counsel's version of the evidence is not enough. A reviewing court must have the words of the witness. As a result, we find this issue has not been preserved.[70]

B. *Burden of Proof*

Self-Defense: The Kentucky Penal Code employs a split burden of proof for the defense of self-defense[71] (and other Penal Code "defenses"[72]). In order to inject the issue of self-defense into the case, the defendant is required to produce evidence sufficient to support a finding of self-defense. The prosecution is required to bear the burden of persuasion (i.e., to prove the

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[67] *Tucker*, 916 S.W.2d at 183.

[68] When evidence is excluded "the witness *may* make a specific offer of his answer to the question." K.R.E. 103(a)(2) (emphasis added). This seems to authorize, but not require, such a procedure. Moreover, the court "may direct the making of an offer in question and answer form," which seems to imply that an avowal by legal counsel is an acceptable way of perfecting the record for appeal. K.R.E. 103(b).

[69] Partin v. Commonwealth, 918 S.W.2d 219 (Ky. 1996).

[70] *Id.* at 223.

[71] *See* KY. REV. STAT. ANN. [hereinafter K.R.S.] § 503.050 (Michie Supp. 1996) (permitting the use of force in self-protection).

[72] The Kentucky Penal Code has two types of defensive elements. One imposes only a limited burden of proof on the defendant and is called a "defense." The other imposes a full burden of proof on the defendant and is called an "exculpatory element." *See* K.R.S. § 500.070 (Michie 1990); LAWSON, *supra* note 2, at 518-19.

absence of self-defense just as it proves other elements of a crime). In other words, the defense is like an element of a crime (to be proved beyond a reasonable doubt), except that the defendant must make it an element of the case by producing supporting evidence.

A question that continues to arise under this law concerns the standard by which to judge a defense motion for directed verdict of acquittal on grounds of self-defense. If the defense is designed to function like an element of a crime (except for the requirement that the accused raise the issue), a directed verdict of acquittal should be granted unless "the totality of the evidence is such . . . that reasonable minds might fairly find [an absence of self-defense] beyond a reasonable doubt."[73] The supreme court has adopted neither that approach nor this standard: "Although the Commonwealth has the burden of proof, it does not have to rebut evidence of a defense. KRS 500.070(1). The defendant is not entitled to a directed verdict of acquittal, *unless the defense is conclusively established.*"[74] If applied literally, the court's standard would seem to resurrect the totally discredited "scintilla rule" and permit the prosecution to defeat motions for directed verdict with *any evidence* tending to negate self-defense claims, no matter how slight or unpersuasive it might be. Whether or not the court really intended to erect such an imposing obstacle to directed verdicts of acquittal on grounds of self-defense is uncertain. Its language – "unless the defense is conclusively established" – is almost sure to be so construed in the lower courts.

Insanity: A problem similar to the one described above exists with respect to the defense of insanity.[75] It usually arises when the expert testimony (prosecution as well as defense) in an insanity case overwhelmingly supports the claim of insanity and leads to a motion for directed verdict of acquittal. In dealing with such motions, the supreme court has used varying language to describe the quantity of proof needed by the prosecution to reach the jury. The court has indicated in some cases that *any evidence* of sanity is sufficient for a jury submission,[76] but in other cases, the state was held to a higher standard

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[73] Hodges v. Commonwealth, 473 S.W.2d 811, 813-14 (Ky. 1971); *see also* LAWSON, *supra* note 2, at 519-23.

[74] Brock v. Commonwealth, 947 S.W.2d 24, 26 (Ky. 1997) (emphasis added); *see also* West v. Commonwealth, 780 S.W.2d 600 (Ky. 1989).

[75] *See* K.R.S. § 504.020. This defense is one of the Penal Code's very few true affirmative defenses. A defendant must produce evidence to raise the issue of insanity and in the end must persuade the triers of fact that he or she is insane.

[76] *See, e.g.*, Hayes v. Commonwealth, 625 S.W.2d 583, 586 (Ky. 1982) ("any evidence indicative of sanity"); Wiseman v. Commonwealth, 587 S.W.2d 235, 237 (Ky. 1979) ("any evidence indicative of his sanity"); Tunget v. Commonwealth, 198 S.W.2d 785 (Ky. 1947) (some evidence of sanity).

of proof.[77] Confusion rather than clarification is likely to result from the court's most recent description of its position:

> This Court has long held that a motion for a directed verdict in a case involving an insanity defense would be defeated as long as there was "some evidence" indicating that the defendant was sane at the time of the commission of the crime. . . . More recently, we stated that "where there is any evidence indicative of [a defendant's] sanity, there is presented an issue of fact for a jury determination." . . . The testimony of Dr. Meyer and certain lay witnesses satisfies this standard. . . . The standard we adhere to is whether "[t]aking this evidence as a whole, it was not clearly unreasonable for any juror to find the defendant was not insane at the time of the incident."[78]

The scintilla rule ("any evidence") provides inadequate protection against irrational decision-making by juries. The standard used in most situations to keep juries within acceptable bounds requires that the trial court find room for reasonable men to differ. The supreme court has inched toward the adoption of such a standard for use with the insanity defense[79] without abandoning the contradictory notion that the jury must be permitted to resolve cases in which there is "any evidence of sanity." As stated in an opinion dissenting from one of the early "any evidence" rulings, when there "is no room for reasonable men to differ . . . [t]he conclusion of insanity is compelled."[80]

C. *Evidence of Liability Insurance*

In *Wallace v. Leedhanachoke*,[81] a medical malpractice plaintiff sought to prove that the defendant's expert witness was insured by the same professional liability carrier that insured the defendant, contending that the

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[77] *See* Port v. Commonwealth, 906 S.W.2d 327, 330 (Ky. 1995) ("The appellate standard . . . is whether it would be clearly unreasonable for a jury to find against the defendant on the issue of insanity."); *see also* Ice v. Commonwealth, 667 S.W.2d 671, 678 (Ky. 1984) (affirming submission to the jury because "[i]t would not be clearly unreasonable for a jury to find against the defendant on the issue of insanity").

[78] Brown v. Commonwealth, 934 S.W.2d 242, 246-47 (Ky. 1996) (quoting *Wiseman*, 587 S.W.2d at 237 and *Port*, 906 S.W.2d at 331, respectively).

[79] *See supra* text accompanying note 78; *see also Port*, 906 S.W.2d at 327.

[80] *Wiseman*, 587 S.W.2d at 240 (Lukowsky, J., dissenting).

[81] Wallace v. Leedhanachoke, 949 S.W.2d 624 (Ky. Ct. App. 1996).

evidence showed bias or prejudice of the witness in favor of the defendant. The trial court excluded the evidence under K.R.E. 411, which forecloses the use of evidence of liability insurance to prove negligence while leaving the door open to the possible use of such evidence to show bias or prejudice of a witness.[82] The court of appeals affirmed, concluding that the trial court had not abused its discretion[83] in ruling the evidence inadmissible:

> The mere fact that the two physicians shared a common insurance carrier – absent a more compelling degree of connection – does not clearly evince bias by the expert, and its arguable relevance or probative value is insufficient to outweigh the well-established rule as to the inadmissibility of evidence as to the existence of insurance.[84]

D. Criminal Records

Background: In *Commonwealth v. Willis*,[85] the supreme court held that a certified copy of a Transportation Cabinet record of a defendant's driving history could not be used to prove prior drunk driving convictions.[86] In *Hall v. Commonwealth*,[87] the court held that a certified copy of a state police record of a defendant's criminal history could be used to prove his prior convictions in the penalty phase of a felony prosecution.[88] The court reasoned in *Willis* that use of the record to prove the prior convictions was barred by the best evidence rule;[89] it reasoned in *Hall* that the best evidence rule was inappli-

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[82] *See* K.R.E. 411.

[83] "We are not prepared to adopt a *per se* rule either permitting or prohibiting this line of cross-examination. Instead, we adopt the balancing test discussed above [i.e., "probative value" versus "prejudicial effect"] to allow trial courts to exercise their broad discretion on a case-by-case basis." *Wallace*, 949 S.W.2d at 628.

[84] *Id.*

[85] Commonwealth v. Willis, 719 S.W.2d 440 (Ky. 1986).

[86] Statutes on drunk driving provide for substantially enhanced penalties upon proof of prior drunk driving convictions. *See, e.g.*, K.R.S. § 189A.010(4)(b), (c), (d) (Michie 1997) (increasing the punishment for subsequent offenses).

[87] Hall v. Commonwealth, 817 S.W.2d 228 (Ky. 1991), *overruled on other grounds by* Commonwealth v. Ramsey, 920 S.W.2d 526 (Ky. 1996).

[88] K.R.S. § 532.055(2)(a) (Michie 1990) provides that in the penalty phase of a bifurcated proceeding, the prosecution may introduce evidence showing the prior criminal convictions of the defendant.

[89] "[T]he best evidence of the fact of conviction is the judgment setting out the conviction. . . . [T]he notations in the Driving History Record are [not] a viable alternative." *Willis*, 719 S.W.2d at 441.

cable because the contents of the record were not in issue or controversy. This reasoning was described in a strongly worded dissent as "seriously flawed" and "artificially contrived."[90]

Recent Cases: In *Robinson v. Commonwealth*,[91] the prosecution was permitted (during the penalty phase of the trial) to prove the defendant's prior convictions by introducing a computer printout from an out-of-state court clerk's office. The record was a compilation of the defendant's criminal history (convictions, sentences, charges, etc.), solicited by an investigating detective and introduced through his testimony.[92] The supreme court ruled the evidence inadmissible notwithstanding the great similarity between this situation and the one in *Hall*. The court spoke of concern about "any further relaxation in the rules of evidence"[93] with respect to this kind of evidence but stopped short of overruling *Hall*:

> While we are not yet ready to reverse course from that set by *Hall* . . . in regard to the admissibility of Kentucky State Police printouts as introduced by a member of that organization, we will not expand that holding to embrace any compilation of data by any court or police agency in the absence of exemplification, as required by KRS 422.040, or a witness who can testify that the record comports with the business record exemption to the hearsay rule.[94]

The court identified the authentication and hearsay problems inherent in this kind of evidence. However, it said nothing about the more significant obstacle that is presented by the best evidence rule, thereby avoiding the need to address the irreconcilable conflict between *Willis* and *Hall*.

In *Commonwealth v. Duncan*,[95] the prosecution attempted to prove the offense of driving on a suspended license by introducing into evidence a certified copy of the defendant's driving history from the Kentucky Transportation Cabinet. The trial court excluded the evidence in a bench trial and found the defendant not guilty when the prosecution offered no other evidence of suspension.[96] The supreme court granted a petition for

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[90] *Hall*, 817 S.W.2d at 231 (Leibson, J., dissenting).

[91] Robinson v. Commonwealth, 926 S.W.2d 853 (Ky. 1996).

[92] *See id.* at 854.

[93] *Id.*

[94] *Id.*

[95] Commonwealth v. Duncan, 939 S.W.2d 336 (Ky. 1997).

[96] *See id.* at 336.

certification of the law on the issue of whether or not the record should have been admitted to prove the suspension. It considered the issue under the best evidence rule, distinguished *Willis*, and declared the evidence admissible:

> [I]f the Commonwealth is required to prove a previous conviction . . . (in order to obtain enhanced penalties for the subsequent DUI conviction), the "best evidence" of that conviction is a certified copy of the prior judgment. We believe the holding in *Willis* . . . is sound as to proving a prior conviction under the facts presented therein.
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> However, in prosecuting a suspended license charge, it is not necessary to prove a prior conviction. Rather, it is only necessary that the Commonwealth prove that the individual was operating a vehicle while his or her license was suspended. . . . Thus, it is the license suspension, and not a conviction, which is essential to establishment of the charge of operating a motor vehicle on a suspended license.[97]

The distinction drawn by the court is sound, as is the ruling that the official record accomplishing and documenting an act of license suspension is the "best evidence" of that suspension.

Conclusion: *Willis* is the most important case in this series, partly because litigants confront the need to prove prior criminal convictions in a wide variety of situations[98] and partly because the decision virtually eliminates the risk of error in proof of what is usually a crucial fact. *Hall* was a controversial decision when rendered. It was incompatible with *Willis* and with the fundamental rule of evidence that a party seeking to prove the contents of a writing must produce the writing itself (absent a satisfactory explanation for nonproduction). The recent cases, *Robinson* and *Duncan*, are consistent with the ruling and rationale of *Willis*, but may be more significant for the indication (especially in *Robinson*) that *Hall* will not be expanded beyond the narrow situation involved in that case.

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[97] *Id.* at 337.

[98] For example, a prior conviction may be needed as an element of an offense (e.g., possession of a firearm by a convicted felon, persistent felony offender, etc.) or to justify enhancement of penalties for subsequent offenses (e.g., trafficking in controlled substances). And, of course, prior convictions may be needed (and are admissible) to impeach the credibility of witnesses in both criminal and civil litigation.